IN THE SUPREME COURT OF THE STATE OF NEW MEXICO

No. S-1-SC-40407

STATE OF NEW MEXICO,

Plaintiff-Petitioner,

v.

SAMUEL NEAL,

Defendant-Respondent.

STATE OF NEW MEXICO'S REPLY BRIEF

On Certiorari from the New Mexico Court of Appeals

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INTRODUCTION

New Mexico courts apply a unique double description test. The State identified the many problems with this approach: it is unmanageably complex and beset with numerous steps, sub-steps, factors, and presumptions (both rebuttable and irrebuttable). Portions of it are redundant or commonly misapplied. It produces unjust results when evaluating serious sex crimes. And it misses the main focus of the inquiry: discerning legislative intent.

In his answer, Defendant declined to acknowledge any shortcomings in New Mexico's test and placed all responsibility for the unjust results it produces on prosecutors. Untimely, he failed to explain *why* New Mexico's approach needs to be so different from that used in other jurisdictions.

Thirty three years after this Court decided *Swafford v. State*, New Mexico courts are once again best by "a profusion of terms and tests" resulting in "doctrinal confusion and occasionally inconsistent results." 1991-NMSC-043, ¶ 16, 112 N.M. 3. Courts face this problem because they departed from *Swafford*'s attempt to ground New Mexico's double jeopardy law in federal jurisprudence.

ARGUMENT

I. The Current Double Description Test Is Intolerably Unworkable.

Defendant argues that the State failed to engage in the analysis required for this Court to overrule precedent. **[*See* AB 8-12 ("[T]he State conducts no analysis as to why changing New Mexico's law satisfies the above factors.")]** But the State spent the better part of 51 pages doing precisely that. As the State pointed out twice in its brief, this Court will overrule precedent that has become "so unworkable as to be intolerable[.]" **[BIC 2, 38 (quoting *Trujillo v. City of Albuquerque*, 1998-NMSC-031, ¶ 34, 125 N.M. 721)]**

After identifying this standard, the State discussed in detail why the current double description test is so unworkable as to be intolerable. Even though New Mexico double description jurisprudence shares the same foundations as federal law and this Court has modified it "to be more in line with [the subsequent development of] United States Supreme Court precedent," *State v. Porter*, 2020-NMSC-020, ¶ 18 (quotation marks omitted), New Mexico's test bears little resemblance to the one used by federal courts or the large majority of other states. **[*See***

BIC 10-25] New Mexico's departure from this baseline has caused serious problems.

Even though the "sole limitation on multiple punishments" is legislative intent, *Swafford*, 1991-NMSC-043, ¶ 25, New Mexico courts must first examine the facts at trial in light of the six *Herron* factors. **[BIC 22]** They must also determine whether the defendant accomplished the crime using separate forces, and whether he completed one crime before the other. **[*Id.*]** Moreover, a court must also decide whether the *Foster* presumption applies, and, if it does, the court must examine the facts under each possible alternative. **[*Id.* 22-23]** A court must then take one last look at the facts—perhaps under a slightly different standard, at least in the context of a conviction resulting from a plea, *see State v. Phillips*, 2024-NMSC-009, ¶ 41—to determine whether the *Foster* presumption was rebutted. This overly complex test draws the focus of the analysis away from the critical question of legislative intent and too readily identifies separate conduct as the same for constitutional purposes. **[*See* BIC 25-28]**

The second prong of the double description analysis suffers from even more serious flaws. When this Court adopted the modified

Blockburger test in 2011, it stressed that courts applying the new test should compare the elements of the relevant crimes "without examining the facts in detail." **[*Id.* 33 (quoting *State v. Gutierrez*, 2011-NMSC-024, ¶ 58)]** Over time, this prohibition faded away, and now courts conducting the modified *Blockburger* analysis routinely delve into facts again. Now, the "focus" of the modified *Blockburger* test is not "simply whether the elements differ, but whether the same evidence, that is, the same underlying conduct, is used to support both charges." *State v. Begaye*, 2023-NMSC-015, ¶ 28. The modified test at best is duplicative of the unitary conduct step of the analysis, and at worst collapses both steps into a single determination. And because New Mexico courts do not allow a negative *Blockburger* result to be rebutted as provided by *Garrett v. United States*, 471 U.S. 773 (1985), a court cannot consider other indicia of legislative intent.

So the problem is not, as Defendant repeatedly suggests, malicious noncompliance from prosecutors. **[*See, e.g.*, AB 36 ("The problem is not that this Court's precedent is unworkable, but that trial prosecutors have not attempted to follow it.")]** These flaws are fundamental problems with the structure of the double description

analysis itself. The State agrees that prosecutors must make appropriate charging decisions. **[*See id.* 1 ("It is the prosecution's duty to ensure that it does not violate a defendant's constitutional rights.")]** But the double description analysis is so complex and depends so much upon the testimony and argument at trial that it is often impossible (or at least very difficult) to predict at the outset of a case whether New Mexico's double jeopardy analysis will bar a charge or not.

Avoiding the complexity of a same evidence inquiry is one of the reasons why the Supreme Court of New Jersey embraced the federal "same-elements" analysis:

> The benefits of the same-elements test are noteworthy: the test is effortlessly applied at early stages of prosecution; it is capable of producing uniform, predictable results; and it aids defendants by reducing multiple court appearances. By contrast, under the same-evidence test, a court cannot determine whether two charges constitute the same offense until later in the process, after the State has proffered the evidence used to support each claim. [S]urely such a procedure is inconsistent with the Double Jeopardy Clause, which was specifically designed to protect the citizen from multiple trials.

State v. Miles, 229 N.J. 83, 96, 160 A.3d 23 (2017) (quotation marks omitted). So, this Court should adopt the federal test to empower

prosecutors to make better charging decisions and to give defendants greater clarity about their possible exposure at trial.

Similarly, Defendant blames problems with the double description analysis on the State's general ignorance of the test. **[*See id.* 2 ("Instead of educating prosecutors . . ."); 36 (same)]** There are two problems with this. First, even if Defendant was right and prosecutors simply cannot understand the double description analysis, that is a good sign that the analysis is far too complex for litigants or lower courts to apply. Second, to the extent prosecutors are confused by the test, they are in good company: this Court has recognized that "[d]ouble jeopardy jurisprudence in New Mexico is a tangled and often laborious analysis," *Phillips*, 2024-NMSC-009, ¶ 13, and that "confusion persists within our double jeopardy jurisprudence" despite earlier attempts at clarification. *Begaye*, 2023-NMSC-015, ¶ 1.

This Court has repeatedly corrected and clarified the double description analysis. *See Phillips*, 2024-NMSC-009. ¶ 41 (holding that the Court of Appeals viewed the unitary conduct / *Foster* inquiry "through the wrong lens"); *Begaye*, 2023-NMSC-015, ¶ 23 (holding that the Court of Appeals erred by applying the strict-elements version of *Blockburger*);

Porter, 2020-NMSC-020, ¶¶ 6-10 (holding that the Court of Appeals erred by relying on precedent that was implicitly overruled by *Gutierrez*).

Despite this Court's efforts to clarify the test, the Court of Appeals here did not apply it properly. The Court did not mention any of the *Herron* factors or consider the other relevant indicia identified in *Phillips*. Instead, the Court said that the rape and the beating were the same because of a partial overlap in facts, ignoring the critical distinction of the criminal sexual penetration (CSP). **[*See* BIC 28-31]** Although it applied the *Foster* presumption to conclude that the kidnapping and the rape were the same, it did not consider whether that presumption was rebutted. **[*See id.* 30]** And it certainly erred by vacating both the aggravated battery and CSP convictions without analyzing whether the battery was the same as the kidnapping. **[*See id.* 49-50]**

Defendant attempts to defend the Court of Appeals' reasoning. **[AB 28-33]** But he commits many of the errors that the Court did. He does not apply the *Herron* factors, or examine whether he committed the crimes with different forces or in sequence. Although he claims that "[u]nitary conduct is not about overlap," **[AB 36]**, he argues that the battery and CSP convictions were the same because of a partial overlap

in facts—that both required proof of "striking and strangling as *an* element." **[*Id.* 29 (emphasis added)]** But as the State pointed out in its brief in chief, this view ignores the hugely important factual difference between the battery and CSP convictions: the rape. **[*See* BIC 29-30]** Tellingly, Defendant did not defend the Court of Appeals' reasoning when it vacated both the CSP and battery convictions; he argues only that his double jeopardy argument that the Court of Appeals rejected would have produced the same result. **[*See* AB 28-33, 39-40]**

That New Mexico's double description analysis is too complex for practitioners or lower courts to correctly apply despite this Court's repeated efforts to clarify the law shows that the analysis is "so unworkable as to be intolerable[.]" *Trujillo*, 1998-NMSC-031, ¶ 34. This Court should provide litigants and lower courts with a manageable, predictable test by returning to the federal double jeopardy analysis.

II. Defendant's Reliance on *Vitale* is Misplaced.

Defendant argues that "the spirit of [*Illinois v.*] *Vitale* [447 U.S. 410 (1980)] can be found in New Mexico jurisprudence[.]" **[AB 18]** But the portions of *Vitale* upon which Defendant relies (1) were dicta, that (2) the United States Supreme Court has since rejected.

In *Vitale*, a juvenile struck and killed two children with his car. 447 U.S. at 411. The responding officer cited the juvenile for the minor traffic offense of failing to reduce speed. *Id.* at 411-12. The juvenile was quickly convicted of that offense. *Id.* at 412. The day after that conviction, the state charged the juvenile with two counts of involuntary manslaughter. *Id.* at 412-13. Eventually, the Illinois Supreme Court held that the state could not prosecute the juvenile for manslaughter without violating the Double Jeopardy Clause. *Id.* at 414-15.

The U.S. Supreme Court reversed the Illinois Supreme Court and remanded for further proceedings to clarify the necessary elements of the crimes. *See id.* at 421. It stated that, "[i]f, as a matter of Illinois law, careless failure to slow is *always a necessary element* of manslaughter by automobile, then the two offenses are the 'same' under *Blockburger* and Vitale's trial on the latter charge would constitute double jeopardy[.]" *Id.* at 420-21 (emphasis added). This statement is consistent with modern federal double jeopardy law—if one crime is entirely subsumed by the elements of another, *Blockburger* would return a presumption against multiple punishment. *See Garrett*, 471 U.S. at 779 (discussing the presumption in such a circumstance). The

Court then, musing about hypothetical scenarios, stated that, "if in the pending manslaughter prosecution Illinois relies on and proves a failure to slow to avoid an accident as the reckless act necessary to prove manslaughter, Vitale would have a substantial claim of double jeopardy." *Vitale*, 447 U.S. at 421.

The Supreme Court later recognized that its hypothetical musings in *Vitale* were dicta. In *Grady v. Corbin*, the Court recognized that that portion of *Vitale* was "dictum," albeit "pointed dictum," and a "suggest[ion.]" 495 U.S. 508, 514-15, 521 (1990) (quotation marks omitted). The *Grady* Court built upon that dicta to engraft a "same conduct" analysis on the *Blockburger* test. *See id.* at 521-22.

The Supreme Court quickly rejected both *Grady*'s same conduct test and its reading of *Vitale* in *United States v. Dixon*, 509 U.S. 688 (1993). In response to Justice Souter's reading of *Vitale* in his dissent, the majority noted:

> Justice SOUTER instead elevates the statement in *Vitale* that, on certain hypothetical facts, the petitioner would have a "substantial" "claim" of double jeopardy on a *Grady*-type theory into a holding that the petitioner would win on that theory. No Justice, the *Vitale* dissenters included, has ever construed this passage as answering, rather than simply raising, the question on which we later granted certiorari in *Grady*.

Id. at 707 (internal citations omitted). Because the Court concluded that *Grady* was "a mistake [that] . . . contradicted an unbroken line of unbroken line of decisions, contained less than accurate historical analysis, and . . . produced confusion," the Court overruled it. *Id.* at 711 (quotation marks omitted). After *Dixon*, it is clear that "the test derived from *Blockburger v. United States* determines whether the crimes are the 'same offense' for double jeopardy purposes." *United States v. Leal*, 921 F.3d 951, 960 (10th Cir. 2019) (citation omitted). *See also Miles*, 229 N.J. at 94 ("Since *Dixon*, the majority of states have similarly ruled that the *Blockburger* same-elements test sets forth the proper test for determining whether two charges are the same offense.").

Because this Court modified its double jeopardy analysis in 2011—many years after *Dixon*—"to be more in line with [the subsequent development of] United States Supreme Court precedent," *Porter*, 2020-NMSC-020, ¶ 20 (quotation marks omitted), it should exorcise the lingering "spirit of *Vitale*" **[AB 18]** from New Mexico jurisprudence as well.

III. Defendant Failed to Justify New Mexico's Unitary Conduct Analysis.

Defendant argues that it is very common for other states to consider unitary conduct, citing *State v. Stephens*, 203 So.3d 134 (Ala. Crim. App. 2016) for the proposition that "courts around the country utilize similar factors [to the *Herron* analysis] to determine whether conduct is unitary." **[AB 22]** But Defendant ignores a critical distinction. *Stephens* was a unit of prosecution case, not a double description case. In *Stephens*, the defendant was charged in one county for abusing a corpse by burying it in an unmarked grave, then, while the charges were pending, was charged in another county for later abusing the same corpse by disinterring, dismembering, and burning it. *Id.* at 136-37. Similarly, *State v. Herron* was a unit of prosecution case—the court had to determine whether the defendant could be convicted of 21 counts of CSP. 1991-NMSC-012, ¶ 1, 111 N.M. 357. The *Herron* court drew factors used by courts in other states to distinguish between multiple counts of rape. *See id.* ¶ 15.

The distinction between unit of prosecution and double description cases is meaningful here. In a unit of prosecution case, a defendant has been charged multiple times for violating the same statute. *See Swafford*,

1991-NMSC-043, ¶ 8 (stating that, in unit of prosecution cases, "the defendant has been charged with multiple violations of a single statute based on a single course of conduct"). So, the question in such cases is whether the facts supporting each charge were sufficiently distinct for a court to infer that the legislature authorized multiple punishments. *See id.* ("The relevant inquiry in those cases is whether the legislature intended punishment for the entire course of conduct or for each discrete act."). In other words: in unit of prosecution cases, it is settled from the beginning that a defendant was charged with multiple offenses that were the same in law. The only question is whether the crimes were sufficiently distinct in fact so as to justify multiple charges. In this context, it makes sense to have a fact-intensive inquiry because examining the distinction between each crime is critical. Even some federal courts apply a more structured factual inquiry in this context. *See United States v. Soto*, 799 F.3d 68, 86 (1st Cir. 2015) (discussing factors employed when "deciding whether multiple prosecutions under the *same statute* violate the Due Process Clause") (emphasis added).

In contrast, defendants in double description cases have been charged under different statutes. In this context, the question is whether,

notwithstanding their distinct designations, the crimes are really "the same offense for double jeopardy purposes." *Id.* ¶ 9. Here, "the polestar guiding courts is the legislature's intent to authorize multiple punishments for the same offense." *Id.* This is because, unlike in unit of prosecution cases, a reviewing court must first determine whether the two offenses were the same in law. Answering this question may settle the issue before a court needs to examine the facts, because the legislature's intent is dispositive. *See, e.g.*, *Dixon*, 509 U.S. at 700-02 (holding that punishing a defendant for contempt and assault with intent to kill based on the "same episode" was permissible because both offenses survived *Blockburger*). Federal courts seem to only consider the facts *after* conducting the legislative intent analysis. **[*See* BIC 16-18]**

Although considering the facts in detail may have a proper secondary role in the double description analysis and some structure may be desirable, Defendant failed to identify any jurisdiction that applies the same rigid, complex, and easy-to-satisfy factual analysis that New Mexico does. As discussed in the State's brief in chief, federal courts appear to review the facts in a flexible manner and require actual identity of conduct, not just a partial overlap of facts, to conclude that

two acts were the same. **[*See* BIC 17-18]** Defendant did not explain why New Mexico courts need to apply 8 factors (the six *Herron* factors, plus the other two considerations identified in *Phillips*) as well as the *Foster* presumption (plus, considering whether it was rebutted) to accomplish the same task. Defendant failed to justify why New Mexico courts analyze double description claims backwards by considering the facts first and the law second. In sum, Defendant failed to show that New Mexico's unitary conduct analysis is required by the Double Jeopardy Clause or consistent with that of other jurisdictions.

IV. Defendant Failed to Justify New Mexico's Approach to Gauging Legislative Intent.

Defendant correctly traces the current form of the modified *Blockburger* test to *Gutierrez*, 2011-NMSC-024, as modified by *State v. Swick*, 2012-NMSC-018. **[AB 23-24]** But he failed to explain *why* the *Swick* Court—without citation to authority to justify the departure, *see* 2012-NMSC-018, ¶¶ 25-27—considered the facts at trial in detail as part of the modified *Blockburger* test.

Doing so violated repeated warnings from the majority in *Gutierrez*, Justice Bosson, and the case upon which *Gutierrez* was based, that courts must apply the modified analysis "*without examining the facts in detail.*"

2011-NMSC-024, ¶ 58 (emphasis in original); *see id.* ¶ 78 (Bosson, J., specially concurring) ("While it makes sense to allow a party to look at the specific language used in the indictment along with the jury instructions to analyze the state's 'legal theory,' any factual inquiry beyond those two limited areas has not been sanctioned by this Court."); *Pandelli v. United States*, 635 F.2d 533, 538 (6th Cir. 1980) ("What the reviewing court must do now in applying *Blockburger* is go further and look to the legal theory of the case or the elements of the specific criminal cause of action for which the defendant was convicted *without examining the facts in detail*.") (emphasis added). So, *Swick*'s large departure from *Gutierrez* remains unexplained and unjustified.

Defendant, returning to his theme, blames the State for drafting "vague and unspecific charging documents and jury instructions." **[AB 27]** There are two problems with this argument. First, such vagueness is often an artifact of this Court's rules. Under Rule 5-205(A) NMRA, many factual allegations are "unnecessary" to include in charging documents. A defendant may always move for a statement of facts. *See* Rule 5-205(C). And many Uniform Jury Instructions do not permit much factual specificity. For example, UJI 14-2801 NMRA defines the essential

elements of attempt, which was a crime at issue in *Swick*. The actus reus element reads: "The defendant began to do an act which constituted a substantial part of the _____ but failed to commit the _____." *Id.* (footnotes omitted). The State may only fill in the blanks with the name of the underlying crime; it cannot further define what the "act" in question was. *See id.* So, any vagueness in instructions modeled on that uniform instruction would not be attributable to the State's efforts to circumvent the Double Jeopardy Clause.

Second, even the vaguest jury instructions will contain one critical thing: all of the essential elements of the charged crime under the State's legal theory. If the jury instructions did not, that absence in itself would likely be fundamental error. *See, e.g.*, *State v. Barber*, 2004-NMSC-019, ¶ 20, 135 N.M. 621 ("[F]ailure to instruct the jury on an essential element, as opposed to a definition, ordinarily is fundamental error[.]"). So, unless the jury instructions were fundamentally erroneous, they will contain all of the essential elements under the State's theory, allowing a reviewing court to conduct a *Blockburger* analysis even under *Pandelli*. *See Pandelli*, 635 F.2d at 539 (describing how the modified test operates on the elements implicated by the State's theory).

Defendant argues that the New Mexico Legislature wrote its criminal statutes in a fundamentally different way from other jurisdictions because it was aware of the modified *Blockburger* test. **[AB 28]** But this is not accurate. First, the statutes at issue in this case were all written before this Court adopted the modified *Blockburger* test in 2011. *See* NMSA 1978, § 30-1-4 (kidnapping, last amended in 2003), § 30-3-5 (aggravated battery, last amended in 1969), § 30-9-11 (CSP, last amended in 2009). Second, Defendant failed to identify any example of a statute written since 2011 that was drafted in a fundamentally different way than its predecessors so as to better fit the modified *Blockburger* test.

Finally, Defendant failed to explain why New Mexico courts do not fully follow *Garrett v. United States*. In its brief in chief, the State argued that, because New Mexico courts do not follow *Garrett*, the double jeopardy analysis ends if *Blockburger* suggests that one crime is subsumed within the other; a reviewing court cannot consider other indicia of legislative intent. **[BIC 38-40]** Defendant apparently did not engage with this argument; *Garrett* does not appear in his table of authorities. Instead, Defendant joined the State in arguing about the legislative history of the kidnapping statute. **[*See* AB 41-42]** Because

Defendant failed to rebut the State's argument, this Court should at least hold that New Mexico courts must follow *Garrett*.

V. The Legislature Authorized Multiple Punishment Under the Kidnapping and CSP Statutes.

The State argued that legislative history shows that the Legislature did not intend to silently overrule longstanding precedent permitting simultaneous convictions for first-degree kidnapping and CSP when it amended the kidnapping statute in 2003. **[BIC 41-43]** In response, Defendant argues that that the Legislature could have intended to do this because the punishment for first-degree kidnapping is great and the State could pursue an enhancement for a relatively minor sex crime. **[AB 42]** Although this is a possible reading of the Legislature's intent, it is not the best one for two reasons.

First, that reasoning would not affect cases where a defendant violently rapes his victim. Before the 2003 amendment, such a defendant could have been convicted of both first-degree kidnapping for inflicting great bodily harm as well as the rape. *See* NMSA 1978, § 30-4-1(B) (1995) (stating that first-degree kidnapping could be predicated upon inflicting great bodily harm); *State v. McGuire*, 1990-NMSC-067, ¶¶ 6-14, 110 N.M. 304 (permitting simultaneous punishments for first-degree kidnapping

and CSP). So, such a defendant would have already faced "18 years of *mandatory* imprisonment" **[AB 42]** for the first-degree kidnapping as well as full punishment for the sex offense. Under Defendant's reading, the Legislature intended to reduce the sentences faced by the most violent sex offenders in the same bill that increased the penalties for sex offenses.

Second, Defendant failed to answer the State's argument that such a reading would result in grave and absurd sentencing disparities. As Judge Medina noted in her dissent in *State v. Serrato*, under Defendant's reading, "a defendant who kidnaps and subsequently inflicts even the slightest physical injury on the victim or a defendant who simply does not voluntarily release the victim in a safe place would receive the exact same punishment as a defendant who kidnaps and violently rapes his victim: Each would be guilty of only a single count of first-degree kidnapping." 2021-NMCA-027, ¶ 52 (Medina, J. dissenting). The Legislature did not intend such a result.

So, even if the kidnapping conviction here subsumed the CSP, the presumption against multiple punishments would be rebutted by the legislative history of the kidnapping statute.

VI. This Court Should Reject Defendant's Unpreserved Request to Expand *Frazier*.

Defendant, for the first time in this case, argues in his answer brief that this Court should expand *State v. Frazier*, 2007-NMSC-032, 142 N.M. 120, to always bar multiple convictions for first-degree kidnapping and sexual offenses. **[AB 44-46]** This Court should not accept this invitation for two reasons.

First, Defendant's request is procedurally improper. If he truly wanted that rule, he could have raised it in his petition for certiorari. But, he did not. As Defendant noted, the Court of Appeals has repeatedly rebuffed this argument. **[AB 45]** Defendant failed to explain why this Court should overrule precedent. An answer brief is not the time to raise such an argument.

Second, Defendant's proposed rule would ignore the "sole limitation on multiple punishments"—"legislative intent." *Swafford*, 1991-NMSC-043, ¶ 25. As the State articulated in its brief in chief, convictions for first-degree kidnapping will sometimes subsume a sex offense, in which case *Blockburger* would raise a presumption that the Legislature did not intend to authorize multiple punishment. **[*See* BIC 48-49]** But, this presumption would be rebutted by other indicia of legislative intent. **[*See***

***id.* 41-43, 49]** This is the proper analysis because it would turn on legislative intent.

In contrast to Defendant's proposed rule here, the federal analysis would both simplify the double description analysis and refocus it on its proper question: determining whether the Legislature authorized multiple punishments.

CONCLUSION

The State respectfully requests that this Court adopt the federal approach to double description claims and affirm Defendant's convictions.

Respectfully submitted,

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STATEMENT OF COMPLIANCE

The body of this brief complies with the limitations of Rule 12-318(F)(3) NMRA because it contains 4,284 words as calculated by Microsoft Word 365.

CERTIFICATE OF SERVICE

I certify that, on November 20, 2024, I filed a true and correct copy of the foregoing Rely electronically through the Odyssey E-File & Serve System, which caused opposing counsel to be served by electronic means.

/s/ Van Snow
Deputy Solicitor General